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THE DEFENSE WITNESS IMMUNITY DOCTRINE: THE TIME HAS COME TO GIVE IT STRENGTH TO ADDRESS PROSECUTORIAL OVERREACHING

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I. Introduction

A disturbing trend in federal white collar crime prosecutions is the government's manipulation of immunity grants and charging decisions to make exculpatory witnesses unavailable to the defendant at trial. In the typical corporate fraud case, after a comprehensive investigation in which the government interviews many corporate executives, the government builds its case against the Chief Executive Officer or other senior corporate executives who are the ultimate targets of the investigation on the testimony of witnesses it has immunized through plea agreements, informal immunity or non-prosecution agreements, or statutory immunity orders. For those executives who do not implicate the defendant, deny participating in any criminal scheme, or otherwise contradict the government's theory of prosecution, the government refuses to grant immunity or formally decline prosecution and instead designates them unindicted "co-conspirators" or potential targets of prosecution. This threat of future prosecution, however unlikely, inevitably leads these potential exculpatory witnesses to invoke their Fifth Amendment right against self-incrimination when subpoenaed by the defendant to testify at trial. Under current law, it is difficult for a defendant to obtain immunity for these potentially exculpatory defense witnesses or any other meaningful relief. Thus, through the guise of "prosecutorial discretion" in immunity and charging decisions, the government is able to prevent the defendant from introducing exculpatory evidence.

Even more troubling is the government's increased use of the co-conspirator exception to the hearsay rule[1] to affirmatively introduce *inculpatory* statements attributed to the very executives it refused to immunize. By deeming the non-immunized exculpatory witnesses "co-conspirators," the government is able to introduce out-of-court statements supposedly made by the non-immunized executives in furtherance of the alleged conspiracy by eliciting them from its immunized cooperating witnesses. In some cases, the government employs this strategy even though the actual co-conspirator declarants specifically denied making the statements or participating in any conspiracy at all when interviewed by the government during the investigation. Due to the government's threat of future prosecution

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1. Fed R. Evid. 801 (d) (2) (E).

against these "co-conspirators," however, the defendant cannot elicit this exculpatory evidence or cross-examine the witnesses whose ostensible statements are offered as evidence against him.

These prosecutorial tactics can lead to profoundly unfair results. For example, in early-2005, we defended Bernie Ebbers, WorldCom's Chief Executive Officer from 1985 through April 2002, in a criminal trial in the U.S. District Court for the Southern District of New York. The government charged Ebbers with securities fraud based on alleged accounting improprieties at WorldCom. WorldCom's Chief Financial Officer, Scott Sullivan, and other employees in the WorldCom accounting department pled guilty and/or received immunity in return for their testimony implicating Ebbers in the fraud. During the investigation, more than two years prior to trial and before Ebbers was even indicted, the government interviewed WorldCom's Chief Operating Officer, the head of SEC Reporting and Financial Disclosures, and the head of Revenue Accounting, each of whom denied participating in any securities fraud, being aware of any "red flags" suggesting fraud at WorldCom or having any conversations with Ebbers that suggested he was aware of any wrongdoing. None of these executives has been charged with any crime.

Prior to trial, the government identified each of these former-WorldCom executives as unindicted co-conspirators and held out the possibility of future prosecution. When Ebbers subpoenaed the executives, each invoked the Fifth Amendment and declined to testify at trial. Thereafter, the district court denied Ebbers' motion seeking defense witness immunity for these executives.

At trial, the government elicited from Sullivan and its other cooperating witnesses, pursuant to the co-conspirator exception to the hearsay rule, several inculpatory statements attributed to the three non-immunized WorldCom executives that it used to prove that the executives were part of the securities fraud conspiracy with Ebbers. In their prior interviews with the government, however, each of the executives had denied making the statements or participating in any conspiracy at all. The district court denied Ebbers' request to impeach the co-conspirator statements with the prior inconsistent, exculpatory statements that the executives made to the government. The district court also refused to provide a "missing witness" jury instruction that would have permitted the jury to infer that the testimony of the missing WorldCom executives would have been unfavorable to the government.

In closing argument, the government prominently featured each of the co-conspirator statements as evidence proving that Ebbers committed securities fraud. However, the district court's prior rulings prohibited us from making any argument in closing about the fact that the three WorldCom executives did not appear in court to corroborate the co-conspirator statements. After eight days of deliberations, the jury convicted Ebbers of the securities fraud charges. The case is currently on appeal.

In recent years, we have faced this situation in other white collar crime cases, and we continue to see prosecutors engaging in similar tactics in ongoing cases around the country.

This article addresses the limited tools available to a defense attorney to counter the unfairness of prosecutorial manipulation of immunity and charging decisions, including (1) seeking an order requiring the government to grant immunity to defense witnesses or face dismissal of the indictment, (2) moving, pursuant to Federal Rule of Evidence 806,[2] to impeach co-conspirator statements with evidence of prior inconsistent statements, and (3) requesting a "missing witness" jury instruction that would permit the jury to infer that the testimony of the non-immunized "co-conspirators" would have been unfavorable to the government. Given the current state of the law, however, it is extremely difficult for a defendant to present an effective defense when the government uses its charging and immunity decisions to render potential defense witnesses unavailable. Now that prosecutors are increasingly pushing the boundaries of the applicable standards, it is time for courts to re-examine the defense witness immunity doctrine to ensure defendants are not denied a fair trial by the government manipulating the system to ensure that exculpatory defense witnesses invoke the Fifth Amendment and become "unavailable" to testify for the defendant at trial.

II. THE DEFENSE IMMUNITY DOCTRINE

Defendants have traditionally faced significant obstacles in obtaining defense witness immunity. The Due Process Clause does not require defense witness immunity to be ordered "whenever it seems fair to grant it."[3] Because immunity is "pre-eminently a function of the Executive Branch,"[4] "as a general rule the government may not be required to confer immunity for the benefit of the defense . . . ."[5]

However, on "rare occasions" courts may "use their coercive powers to force the government to grant immunity."[6] For instance, the Second Circuit has adopted "a three-part test for requiring the government to grant defense witness immunity at the risk of dismissal of the indictment:"[7]

> First, the district court must find that the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the fifth amendment. Second, the witness's testimony must be "material, exculpatory, and not cumulative." Third, the testimony must be unobtainable from any other source.[8]

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2. *See* FED R. EVID. 806, which provides that after a statement by a co-conspirator has been admitted pursuant to FED R. EVID. 801 (d) (2) (E), the credibility of the co-conspirator may be attacked as if he had testified as a witness.

3. United States v. Turkish, 623 F.2d 769, 777 (2d Cir. 1980).

4. *Id*. at 776.

5. United States v. Dolah, 245 F.3d 98, 105 (2d Cir. 2001), overruled on other grounds by Crawford v. Washington, 541 U.S. 36 (2004).

6. United States v. Bahadar, 954 F.2d 821, 825 (2d Cir. 1992).

7. *Id*. at 826.

8. *Id*. (quotation omitted) (citing United States v. Burns, 684 F.2d 1066, 1077 (2d Cir. 1982)).

This approach "recognizes the essential unfairness of permitting the Government to manipulate its immunity power to elicit testimony from prosecution witnesses who invoke their right not to testify, while declining to use that power to elicit from recalcitrant defense witnesses testimony" that meets the three-part test.[9] This "carrot-and-stick approach, leav[es] the immunity decision to the executive branch but interpos[es] the judicial power to subject the government to certain choices of action."[10]

A. The "Discriminatory Use" Component Of The Defense Witness Immunity Test Should Be Expanded To Prevent Prosecutorial Manipulation

The first part of the defense witness immunity test requires a showing that "the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the fifth amendment."[11] The "overreaching" encompassed by the test includes (1) conduct "which substantially interferes with the defense, or with a potential defense witness's unfettered choice to testify,"[12] or (2) "deliberate denial of immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation."[13] Defendants have faced significant difficulty meeting this first prong of the test.[14] Courts have reasoned that granting defense witness immunity creates obstacles to future prosecution of such witnesses and gives rise to the likelihood of "cooperative perjury among law violators."[15] For these reasons, some courts have suggested that all a prosecutor must do to defeat a motion for defense witness immunity is represent to the district court in an *ex parte* declaration that the witness is a potential target of prosecution.[16]

However, other courts have held that there are situations in which prosecutorial overreaching may justify ordering the government to grant defense witness immunity or face dismissal of the indictment. For instance, in *United States v. Lord*,[17] the court reversed a conviction and remanded the matter for an evidentiary

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9. *Dolah*, 245 F.3d at 106.

10. *Bahadar*, 954 F.2d at 826.

11. *Id*. at 826.

12. Blissett v. Lefevre, 924 F.2d 434, 442 (2d Cir. 1991) (citing United States v. Pinto, 850 F.2d 927, 932 (2d Cir. 1988)).

13. *Id*.

14. *See*, *e.g.*, *Bahadar*, 954 F.2d at 826 ("[A]though our test for requiring the government to grant use immunity has been in place for at least eight years, we have yet to be presented with a case in which the defendant gets over the first hurdle, let alone succeeds entirely."); United States v. Karlsen, No. S4 00 CR. 502(JSM), 2001 WL 428246, at *1 (S.D.N.Y. Apr. 26, 2001) ("While . . . courts have assumed that there could be circumstances that would justify requiring the Government to grant immunity to a defense witness, no case has been cited in which a court actually granted that relief.").

15. *Turkish*, 623 F.2d at 775.

16. *Id.* at 778; United States v. Todaro, 744 F.2d 5, 9 (2d Cir. 1984).

17. United States v. Lord, 711 F.2d 887 (9th Cir. 1983).

hearing to determine whether the prosecutor caused a potential defense witness to invoke the Fifth Amendment by telling the witness prior to trial that his role in the crime "was so minor that he really didn't want to prosecute . . . but he would, depending on [the witness's] testimony."[18] If on remand the district court concluded that the prosecutor engaged in such conduct, the court was ordered to enter a judgment of acquittal unless the prosecutor agreed to immunize the witness.[19]

Recent prosecutorial tactics suggest that the time has come for courts to re-evaluate what conduct by the government will amount to a discriminatory use of immunity to gain a tactical advantage in litigation, and thus be sufficient to meet the first prong of the defense witness immunity standard. One such tactic is the growing trend of the government affirmatively introducing co-conspirator statements attributed to witnesses the government refuses to immunize. In this scenario, immunized cooperating witnesses provide the government with information about statements allegedly made by other executives suggesting that the other executives participated in a conspiracy with the defendant. When the government interviews the other executives, the executives deny making such statements or participating in any conspiracy at all. The executives may also inform the government that they did not intend to commit any crime when they engaged in the conduct under investigation, or that they had no conversations with the defendant suggesting that he engaged in any wrongdoing. Prior to trial, the government designates these executives "co-conspirators" and potential targets of prosecution, which virtually guarantees that they will assert the Fifth Amendment when called by the defendant to testify at trial and gives the government an evidentiary vehicle to introduce their prior out-of-court statements. When these individuals, as expected, assert their Fifth Amendment rights, the government is free to introduce their statements under the co-conspirator exception to the hearsay rule with no risk that the defendant can cross-examine the co-conspirator declarants or otherwise elicit their exculpatory evidence. This tactic permits the government to portray the alleged criminal wrongdoing as widespread throughout an organization, through the testimony of only a few cooperating witnesses from whom the government elicits the co-conspirator statements.

To our knowledge, no court has squarely addressed whether such conduct by the government amounts to a discriminatory use of immunity sufficient to meet the first prong of the defense witness immunity test. However, the Second Circuit faced a similar situation in *United States v. Dolah*, where the defendants claimed they had been denied a fair trial because the government had selectively granted

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18. *Id.* at 889.

19. *Id.* at 891-92; *see also* Gov't of Virgin Islands v. Smith, 615 F.2d 964, 969 (3d Cir. 1980) (reversing and remanding for an evidentiary hearing where the prosecutor refused to consent to local authorities immunizing a potential defense witness possessing exculpatory evidence and thereby potentially distorting the fact-finding process; the remedy if misconduct was found was judgment of acquittal or new trial if the government consented to immunize the defense witness).

immunity to certain witnesses while refusing to grant immunity to other witnesses whose plea allocutions the government admitted as statements against interest.[20] The government's tactical immunity decisions deprived the defendants of the ability to cross-examine the witnesses whose plea allocations were admitted against them.[21] The court held that the defendants had "presented a substantial argument" that the admission of the plea allocutions following the government's selective immunity grants was "a fundamental unfairness that might well amount to a denial of due process."[22]

Similarly, by affirmatively introducing purported co-conspirator statements of non-immunized witnesses, with knowledge that the actual witnesses have denied making the very same statements, the government creates a fundamentally unfair situation that deprives a defendant of a fair trial. In such a case, even though the non-immunized witnesses have denied making the co-conspirator statements attributed to them, the defendant cannot call them to testify because the government's refusal to decline prosecution or grant immunity has led each witness to invoke the Fifth Amendment. Just as in *Dolah*, the government's tactical immunity decisions prevent a defendant from cross-examining the individuals whose out-of-court statements are introduced against him as critical evidence that he participated in a conspiracy. Such conduct by the government should be deemed sufficient to meet the first prong of the defense witness immunity test.

Courts should also re-evaluate decisions suggesting that trial judges may "summarily reject" claims for defense witness immunity if the prosecutor submits an *ex parte* declaration indicating that the witness is "an actual or potential target of prosecution."[23] If the government could summarily defeat such a motion merely by stating *ex parte* that the witness at issue is a potential target of prosecution, a defendant could never obtain relief from the government's tactical manipulation or misconduct. Such decisions were based on legitimate concerns that granting immunity to defense witnesses might invite perjury or make it difficult for the government to prosecute the witness in the future.[24] Yet these concerns do not apply in every case. Courts should closely examine whether the government's refusal to immunize or decline prosecution of a potential defense witness is truly based on legitimate prosecutorial discretion rather than a desire to withhold exculpatory evidence from the defendant.

For instance, in the Ebbers case, the witnesses who the government claimed were potential targets of future prosecution – the designation that led the witnesses to invoke the Fifth Amendment at trial – had all been interviewed by the

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20. *Dolah*, 245 F.3d at 100.

21. *Id.*

22. *Id.* at 107. However, the court held that the error was harmless given the overwhelming evidence against the defendants and the lack of any showing that the non-immunized witnesses possessed exculpatory evidence. *Id.*

23. *Turkish*, 623 F.2d at 778.

24. *Id.* at 775-76; *Todaro*, 744 F.2d at 9.

government more than two years prior to the trial. Moreover, Ebbers was WorldCom's CEO and the obvious principal target of the government's investigation, whereas the potential defense witnesses were his subordinates. In such a situation, there is no reason why the government cannot decide whether to prosecute the witnesses at issue prior to trial, and there is a virtual certainty that witnesses will invoke the Fifth Amendment if the government refuses to decline prosecution. It is difficult to see how the government's decision to maintain a witness' status as a potential target of prosecution, years after the witness has been interviewed and with knowledge that the witness possesses highly pertinent information concerning an impending trial, is not conduct that both "interferes with . . . a potential defense witness's unfettered choice to testify" and amounts to a "deliberate denial of immunity for the purpose of withholding exculpatory [information] and gaining a tactical advantage."[25]

In addition, in a situation in which the government has interviewed the potential defense witnesses during its investigation, there is little risk that ordering defense witness immunity will invite perjury or raise meaningful obstacles to the future prosecution of the witnesses.[26] Those concerns are only legitimate where defense witness immunity is ordered blindly without any indication of the witness's potential testimony. Where the government has interviewed all of the witnesses before the trial, the government has a record of their potential testimony and already has a basis to pursue perjury or false statement charges if it believes the witnesses have not told the truth. In such a case, immunizing a witness will not result in the fabrication of exculpatory evidence previously unknown to the government. Moreover, in any future prosecution of the witness, the government's prior interviews should provide a solid basis for the government to demonstrate that its evidence against the witness was not derived from the immunized testimony.

In sum, recent experience indicates that the government routinely determines who to immunize and who to designate as unindicted co-conspirators, not based on "prosecutorial discretion" or the "search for the truth," but rather on tactical considerations designed to (1) maximize the likelihood that potential defense witnesses will invoke their Fifth Amendment right to decline to testify, and (2) enable the government to introduce evidence through the co-conspirator hearsay exception that it could not obtain from the actual witnesses themselves. To counter this profoundly unfair situation, defendants must push the district courts to re-evaluate the dated defense witness immunity case law by arguing that such conduct by the government amounts to a discriminatory use of immunity to gain a tactical advantage. Once that initial hurdle is overcome, it is far easier to meet the other prongs of the defense witness immunity test by showing that the relevant

25. *Blissett*, 924 F.2d at 442.
26. *Turkish*, 623 F.2d at 775.

testimony is exculpatory and unavailable from other sources, as set forth below.

B. Courts Should Broadly Interpret "Exculpatory Evidence" For Purposes Of The Defense Witness Immunity Doctrine, Particularly In White Collar Crime Cases Where Criminal Intent And Knowledge Are Typically The Critical Issues

The second prong of the three-part test for defense witness immunity requires the defendant to establish that the witnesses at issue would provide testimony that is material, exculpatory, and not cumulative.[27] Few courts have defined "exculpatory evidence" for purposes of the defense witness immunity doctrine, largely because it is so difficult for the defendant to satisfy the first prong of the test by demonstrating that the government engaged in a discriminatory use of immunity to gain a tactical advantage. However, courts have stated in the context of the government's *Brady* obligations that exculpatory evidence means "favorable evidence to the accused . . . [that] is 'material' either to guilt or to punishment" or "useful to impeach the credibility of a government witness."[28]

A defendant's initial challenge is identifying the nature of the exculpatory evidence possessed by the potential defense witnesses for whom immunity is sought, in order to make the requisite showing to the district court. In some cases, where the potential witnesses are willing to be interviewed by defense counsel, the defendant can submit an *ex parte* declaration with the motion for defense witness immunity summarizing the exculpatory testimony from first-hand interviews. However, in our experience, potential defense witnesses – particularly those that have been interviewed by the government and warned that they are potential targets of prosecution – are rarely willing to be interviewed by defense counsel for fear that the government will learn of their cooperation with defense counsel and seek retribution. Fortunately, in many large white collar crime cases, there are other sources of information available. Corporations under siege by allegations of corruption frequently commission an outside law firm to conduct an internal investigation and publish a report summarizing its results. In such cases, a defendant may be able to identify the exculpatory evidence in the underlying witness interview memoranda if it is available in discovery in the criminal case or in parallel civil proceedings. Finally, in some cases, the government may disclose to the defendant its own witness interview memoranda or grand jury transcripts of potentially exculpatory witnesses pursuant to its *Brady* and *Giglio* obligations.

The defendant's next challenge is convincing the district court that the potential defense witness testimony is exculpatory. In many white collar crime cases, there is little dispute over whether the relevant conduct took place and the defendant participated in it. The disputed issues revolve around whether the conduct amounted to a crime and whether the defendant participated in the scheme with

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27. *Bahadar*, 954 F.2d at 826.

28. In re United States v. Coppa, 267 F.3d 132, 139 (2d Cir. 2001) (citations omitted).

knowledge of its fraudulent nature and criminal intent. In such a case, testimony from other similarly-situated corporate executives that (1) they participated in the same events as the defendant but did not believe they were engaged in fraud, or (2) they never discussed fraud or had other conspiratorial conversations with the defendant, is exculpatory because it demonstrates circumstantially that the defendant was unaware of any fraud and did not act with criminal intent.

In other white collar crime cases, the defendant may contend that he had no knowledge of fraudulent acts committed by others at the company and was deceived by executives who committed fraud under his watch. In such a case, testimony from other senior executives that they too were unaware of fraud at the company and were deceived by their co-workers is exculpatory because it renders more plausible the defendant's similar defense. In essence, evidence that other smart, sophisticated corporate executives were duped and unaware of any "red flags" suggesting fraud at the company strongly supports a lack of knowledge defense.

In the Ebbers case, however, the district court accepted the government's argument that testimony from other WorldCom senior executives that they were unaware of the fraud was merely "self-exculpatory" and not testimony that "directly exculpated" the defendant. The court reasoned that such evidence did not prove that the defendant was similarly situated, or that the other individuals saw the same documents as the defendant. In virtually all white collar crime cases, however, where knowledge and criminal intent are the critical issues, it is difficult to imagine any evidence that could "directly exculpate" the defendant. No witness in such cases could provide an alibi or testify that he or someone else committed the crime instead of the defendant. Evidence that other senior executives were unaware of the fraud, did not discuss fraud with the defendant, or did not believe that their actions were fraudulent supports circumstantially the defendant's similar defense of lack of knowledge and criminal intent. Although such testimony is not conclusive and no witness can testify to what another individual knew or intended, the jury should be permitted to decide whether such testimony supports the defense.

C. Defendants Should Face Little Difficulty Demonstrating That The Testimony Is Unavailable From Any Other Source

The final prong of the three-part test for defense witness immunity requires the testimony to be "unobtainable from any other source."[29] Although this analysis must be conducted on a case-by-case basis, it should be fairly easy for defendants to meet this standard. If the government has introduced co-conspirator statements attributed to the witness for whom the defendant seeks immunity, there will obviously be no other available witness who could refute those statements.

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29. *Bahadar*, 954 F.2d at 826.

Moreover, the potential defense witnesses for whom the defendant will typically seek immunity are likely to be the senior executives of the company whose testimony that they were unaware of the fraud or did not act with criminal intent will be meaningful and persuasive to the jury. In most cases, individuals who fall within this category will either be government cooperating witnesses or deemed co-conspirators or potential targets of prosecution by the government. The cooperating witnesses will not be sources of equivalent exculpatory testimony. The unindicted co-conspirators are likely to assert the Fifth Amendment and be unavailable to testify at trial. Thus, the defendant should be able to successfully demonstrate that the testimony he seeks through defense witness immunity is not available from other sources in a position to testify at trial.

III. IF A REQUEST FOR DEFENSE IMMUNITY FAILS, THE LIMITED REMAINING OPTIONS CAN MITIGATE THE DAMAGE BUT ARE NO SUBSTITUTE FOR LIVE TESTIMONY

If a district court denies the defendant's request for defense witness immunity and the government proceeds to elicit co-conspirator statements attributed to the non-immunized witnesses, a defendant has only a few options to counter the unfairness of the situation. First, the defendant can attempt to impeach the co-conspirator statements introduced by the government with evidence that the co-conspirators made prior inconsistent statements to the government. Second, the defendant can request a "missing witness" instruction that would permit the jury to infer that the testimony of the individuals for whom he was unable to obtain immunity would have been unfavorable to the government. Unfortunately, neither action is remotely comparable to the ability to introduce substantive evidence through immunized defense witnesses, and even this limited relief is difficult to obtain.

A. Co-Conspirator Declarants May Be Impeached As If They Have Testified As Witnesses Pursuant To Federal Rule Of Evidence 806

By deeming individuals unindicted "co-conspirators," the government may admit their out-of-court statements as substantive evidence, admitted for its truth, as long as the statements are made "during the course of and in furtherance of the conspiracy."[30] However, Federal Rule of Evidence 806 provides that the credibility of the declarant of a co-conspirator statement may be attacked "by any evidence which would be admissible for those purposes if declarant had testified as a witness."[31] "Rule 806 simply makes an otherwise hearsay statement admissible when the declarant (co-conspirator) has not taken the stand, but his statements have nevertheless come into evidence as a statement in furtherance of the

30. FED. R. EVID. 801(d) (2) (E).
31. FED. R. EVID. 806.

conspiracy."[32] Under Rule 806, "[a] hearsay declarant may therefore be impeached by showing that the declarant made inconsistent statements."[33]

For two statements to be inconsistent, they "need not be diametrically opposed."[34] Indeed, prior statements of a co-conspirator declarant that are "inconsistent with the existence of any conspiracy at all" are admissible pursuant to Rule 806.[35]

Rule 806 gives a defendant the ability to mitigate the damage caused by the admission of co-conspirator statements against him by putting before the jury prior exculpatory statements of the co-conspirator declarants that are inconsistent with the evidence admitted at trial. Such statements might lead the jury to question the reliability of the co-conspirator statements or even to doubt the existence of any conspiracy at all.

Nonetheless, Rule 806 impeachment is no substitute for substantive exculpatory testimony obtained through defense witness immunity because a defendant cannot argue that the statements admitted for impeachment are true. As the Fifth Circuit has stated, "the hallmark of an inconsistent statement offered to impeach a witness's testimony is that the statement . . . is not offered for the truth of the matter asserted, . . .; rather, it is offered only to establish that the witness has said both 'x' and 'not x' and is therefore unreliable."[36] Thus, the defendant cannot argue that prior inconsistent, exculpatory statements admitted to impeach the co-conspirator declarant are true. In contrast, the government is free to use the co-conspirator statements as substantive evidence and argue the truth of those statements in closing argument. Thus, even if the district court permits Rule 806 impeachment, the defendant is at a decided disadvantage.

B. As A Last Resort, A Defendant Should Request A "Missing Witness" Jury Instruction

If all else fails, a defendant should seek a "missing witness" jury instruction that would at least permit the defendant to argue in closing that the non-immunized witnesses who were not called to testify at trial would have provided testimony favorable to the defense. A typical "missing witness" instruction provides:

> You have heard evidence about a number of witnesses who have not been called to testify. The defense has argued that the witnesses could have given

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32. United States v. Rosario, 111 F.3d 293, 296 (2d Cir. 1997).

33. United States v. Trzaska, 111 F.3d 1019, 1024 (2d Cir. 1997).

34. United States v. Agajanian, 852 F.2d 56, 58 (2d Cir. 1988) (citation omitted).

35. United States v. Grant, 256 F.3d 1146, 1155 (11th Cir. 2001); *see also* United States v. Wali, 860 F.2d 588, 591 (3d Cir. 1988) (a defendant can "admit exculpatory statements of [an] alleged co-conspirator for the purposes of impeachment under Rule 806" if they are "inconsistent with his co-conspirator statements that inculpated" the defendant).

36. United States v. Graham, 858 F.2d 986, 990 n.5 (5th Cir. 1988); *see also* United States v. Mejia-Velez, 855 F. Supp. 607, 616 (E.D.N.Y. 1994) (rejecting proposed Rule 806 impeachment where "it was obvious that counsel really sought to admit the statement solely for its truth").

> material testimony in this case and that the government was in the best position to produce these witnesses.
>
> If you find that these uncalled witnesses could have been called by the government and would have given important new testimony, and that the government was in the best position to call them, but failed to do so, you are permitted, but you are not required, to infer that the testimony of the uncalled witnesses would have been unfavorable to the government.
>
> In deciding whether to draw an inference that the uncalled witnesses would have testified unfavorably to the government, you may consider whether the witnesses' testimony would have merely repeated other testimony and evidence already before you.[37]

Such an instruction is of limited value because the jury must first find that the government was in the best position to call the missing witnesses, and then is merely permitted, but not required, to infer that the missing witnesses' testimony would have been unfavorable to the government. Moreover, the missing testimony itself is not before the jury. Therefore, at best, the jury can merely speculate as to how the testimony of the missing witnesses would have been unfavorable to the government.

In any event, a defendant cannot obtain a "missing witness" instruction based solely on the government's refusal to immunize a witness. As the Second Circuit in *United States v. Myerson* stated, courts that have "consider[ed] the issue are unanimous . . . in holding that, despite the government's power to grant immunity, a witness invoking his constitutional rights is unavailable to the government as well as the defense, and no missing witness charge need be given."[38] However, the *Myerson* court went on to state "that in the absence of circumstances that indicate the government has failed to immunize an exculpatory witness, a district court does not abuse its discretion by refusing to give a missing witness charge."[39] This ruling suggests that where *there are* circumstances indicating that the government has refused to immunize an exculpatory witness, a district court should give a missing witness charge if requested by the defendant.

A defendant should be permitted to obtain a missing witness instruction in such

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37. 1 LEONARD SAND, ET AL., MODERN FEDERAL JURY INSTRUCTIONS § 6.04, Inst. 6-5 (2004) (Missing Witness Not Equally Available to Defendant).

38. 18 F.3d 153, 158 (2d Cir. 1994) (citing United States v. St. Michael's Credit Union, 880 F.2d 579, 598 (1st Cir. 1989); United States v. Brutzman, 731 F.2d 1449, 1453-54 (9th Cir. 1984); United States v. Simmons, 663 F.2d 107, 108 (D.C. Cir. 1979); United States v. Flomenhoft, 714 F.2d 708, 713-14 (7th Cir. 1983)).

39. *Myerson*, 18 F.3d at 160. Although the court affirmed the denial of a request for a missing witness instruction in *Myerson*, the circumstances suggested that the witness would have provided *inculpatory* testimony and that the defendant was engaged in gamesmanship solely to obtain the instruction. *Id*. at 158-60. Among other things, counsel for the witness indicated that his client's testimony would have been unfavorable to the defendant, and the defendant declined the district court's offer to have the witness testify outside the presence of the jury. *Id.* at 158 n.6. Such concerns would be inapplicable in a case in which a defendant legitimately tries to obtain the testimony of exculpatory witnesses, such as by filing a motion for defense witness immunity.

circumstances for reasons of fundamental fairness. If the district court permits the government to introduce co-conspirator statements attributed to individuals who the defendant is unable to call to rebut those statements, the court should at least permit the defendant to argue that the jury should draw an inference unfavorable to the government from the fact that none of the individuals testified to corroborate the co-conspirator statements. The refusal to provide a missing witness instruction in these circumstances leaves a defendant with literally no response to devastating co-conspirator evidence.

IV. CONCLUSION

The ability of a defendant to obtain defense witness immunity for exculpatory witnesses exists in theory under current law, but is difficult to obtain absent extraordinary circumstances or serious prosecutorial misconduct. We submit that the time has come for courts to re-evaluate and strengthen the defense witness immunity doctrine to counter the government's increasingly one-sided use of the immunity power and charging decisions for tactical advantage. The system permits prosecutors to "play within the rules" but still make immunity and charging decisions that effectively place exculpatory witnesses out of a defendant's reach. Now that those decisions are increasingly accompanied by an effort to convict defendants on the basis of "co-conspirator" statements attributed to the very same witnesses, the time has come to change the system.

The current set of rules permit prosecutors to (1) unilaterally decide that the government's cooperating witnesses are telling the truth as to the existence of the co-conspirator statements whereas the actual co-conspirator declarants are lying, and (2) use that determination to justify the charging and immunity decisions that place the co-conspirator declarants in possession of exculpatory evidence (or in the government's view, the "self-serving lies") out of the defendant's reach. We believe those credibility determinations should be left to the jury to decide. Strengthening the defense witness immunity doctrine would go a long way toward placing the power to decide criminal cases back in the hands of the jury and preserving a defendant's right to a fair trial.